bringing into Singapore such a large quantity of diamorphine merely for those reasons.

For the above reasons, we dismissed the appeal.

Appeal dismissed.

Solicitors: *Loh Lin Kok & Co.*

Reported by *Ng Sheau Jiuan*

MTU Asia Pte Ltd v Brightside-Woh Hup

HIGH COURT (SINGAPORE) – SUIT NO 2554 OF 1986
CHAN SEK KEONG JC
27 JULY 1987

Contract – Frustration – Defence of – Defendants requested suspension of delivery of equipment under supply contract with plaintiffs – Plaintiffs not agreeable to indefinite suspension of supply contract – Writ issued for breach of contract – Whether defendants' defence of frustration due to termination of subcontract between defendants and third party viable – Whether project that defendants were involved in was fundamental to performance of supply contract

The defendants were subcontractors of Turner (East Asia) Pte Ltd ('Turner') who were the main contractors employed by Gateway Land Pte Ltd in a development project known as the Gateway Project. By a subcontract, the defendants agreed to carry out and complete certain subcontract works. In performance of part of their obligations under the subcontract, the defendants agreed to buy from the plaintiffs and the plaintiffs agreed to supply to the defendants ('the supply contract') certain equipment. Subsequently, the defendants telexed the plaintiffs to suspend all manufacture/delivery of the equipment. The plaintiffs informed the defendants that they would not agree to an indefinite suspension of the contract and required the defendants to reply as to when they could accept delivery of the equipment. The defendants failed to reply and as a result, the plaintiffs commenced proceedings for damages for breach of contract against the defendants.

The assistant registrar gave unconditional leave to the defendants to defend the action. The plaintiffs appealed to the High Court. The defendants' main contention was that they were prevented from accepting the equipment purchased from the plaintiffs because of the termination of the subcontract between the defendants and Turner, which event, being beyond the control of the defendants, amounted in law to frustration of the supply contract. The defendants submitted that the supply contract needed for its foundation the continuing existence of the Gateway Project and that the cancellation of the Gateway Project had frustrated the supply contract.

Held, allowing the appeal:

(1) Taking into account the additional facts disclosed in Suit No 3599 of 1985 (in which the defendants had sued Turner for payment of sums payable under the subcontract) frustration as a defence was not available to the defendants on the ground, firstly, that the defendants' reason for not accepting delivery of the equipment was that Turner had terminated the main contract and had stopped work and not because the Gateway Project had ceased to exist. Also, any default of Turner in respect of their obligations under the subcontract was a contingency which had been provided for in cl 21 of the subcontract. Secondly, in the circumstances of this case, counsel's argument that the continued existence of the Gateway Project formed the basis of the supply contract had no factual or legal basis.

(2) In the court's view, the nature of the supply contract and the surrounding circumstances could not justify a court in implying that the continued existence of the Gateway Project was fundamental to the performance of the supply contract by either party.

(3) The main contract was not frustrated but merely breached. The determination of the main contract led to the determination of the subcontract by its own terms. It follows that the subcontract could not have been frustrated. That being the case, there was no basis for arguing that the supply contract was frustrated.

Cases referred to

1 *Levey & Co* v *Goldberg* [1922] 1 KB 688 (refd)
2 *Krell* v *Henry* [1903] 2 KB 740 (refd)
3 *Davis Contractors Ltd* v *Fareham Urban District Council* [1956] AC 696 (refd)

Chan Kok Chye for the plaintiffs.
Chia Quee Khee for the defendants.

Cur Adv Vult

Chan Sek Keong JC: On 6 March 1987, I allowed the appeal of the plaintiffs against the decision of the assistant registrar granting unconditional leave to the defendants to defend the plaintiffs' claim for damages for breach of contract.

As the defendants have appealed against my decision, I would like to set out the facts and elaborate on the grounds of decision which I gave in summary form on 6 March 1987.

The facts are simple. The defendants were subcontractors of Turner (East Asia) Pte Ltd ('Turner') who were the main contractors employed by Gateway Land Pte Ltd ('the employers') in a development project known as the Gateway Project at Beach Road, Singapore. By a subcontract dated 2 November 1983 ('the subcontract'), which was supplemental to the main contract between Turner and the employer, the defendants agreed to carry out and complete certain subcontract works at the price of $45,620,000 on the terms and conditions contained therein.

The subcontract works comprised the following:

(a) air-conditioning and mechanical ventilation services;
(b) electrical services;
(c) plumbing and sanitary services;
(d) fire services.

In performance of part of their obligations under the subcontract, the defendants on 24 October 1983 agreed to buy from the plaintiffs and the plaintiffs agreed to supply to the defendants ('the supply contract') three diesel generating sets including ancillary equipment ('tthe equipment') described as '3 No MTU 12V396 TC 32 Gensets' 'all strictly in accordance with attached technical data submittals ref KGW/BWH/16010–01 sheets 1-9 inclusive and your (plaintiffs') quotation ref MSE/325/ENQ/83' at the total price of $940,000 for delivery to site in September 1984 and for commissioning in February 1985. The price was payable in instalments, with a 10% downpayment, 80% upon delivery of equipment to site (which applied to partial delivery) and 10% upon completion of installation.

By a letter dated 26 October 1984, the defendants requested the plaintiffs to defer delivery of the equipment to April-May 1985 for testing and commissioning in July 1985. The price included installation, testing and commissioning.

On 21 December 1984, the defendants telexed the plaintiffs to say:

> Due to instructions from the main contractor you are hereby instructed to immediately suspend until further notice all manufacture/delivery of items of equipment against any and all purchase orders issued by us to you for the gateway project.

On 26 December 1984, the plaintiffs telexed the defendants to reply:

(1) We acknowledge receipt of your telex ref 12024 dated 21 December 1984;

(2) Referring to your purchase order no BWH/002/008 dated 24 October 1983 you had specified that delivery to site is September 1984 and test and commissioning February 1985. However, in another of your letter REF BW/GW/F 16010/1354/84 dated 26 October 1984 the delivery, testing and commissioning had been amended as follows:

		Delivery date	*Test and commissioning*
(a)	Gensets and fuel tanks	April 1985	July 1985
(b)	Control Panel	May 1985	July 1985

(3) We wish to draw your attention that all the 3 gensets had already been coupled and assembled since October 1984 in our premises and the control panels ETA Singapore mid-January 1985;

(4) We trust you appreciate the fact that we had already paid to our principals and suppliers for the above gensets and panels. We consider it is fair that you remit to us the 80% progressive payment to defray the costs that we have incurred in trying to fulfil your delivery requirements.

On 30 November 1985, the plaintiffs through their solicitors informed the defendants that they would not agree to an indefinite suspension of the contract and required the defendants to reply within 14 days as to when they could accept delivery of the equipment, failing which the plaintiffs would consider themselves discharged from further liability to perform the supply contract and seek damages from the defendants.

The defendants failed to reply as a result of which the plaintiffs by a letter dated 14 March 1986 made a claim of $546,870.16 against the defendants for damages for breach of contract. Particulars of these damages are set out in the statement of claim. The writ commencing these proceedings was filed on 1 April 1986 and the application for summary judgment was filed on 22 April 1986.

Before the assistant registrar, the defendants submitted that they had a defence on two grounds, ie (1) the defendants were prevented from accepting the equipment purchased from the plaintiffs by the termination of the subcontract between the defendants and Turner, which event, being beyond the control of the defendants, amounted in law to frustration of the supply contract; (2) the plaintiffs had failed to tender the equipment.

The case for the plaintiffs was that although they were aware that the equipment was ordered for the Gateway Project, they had never been informed by the defendants that the equipment was intended exclusively for such project or that the continuing existence of that project was to be the basis on which parties entered into the contract, and that if the defendants had stipulated that as the basis, the plaintiffs would never have agreed to sell the equipment. The plaintiffs also denied that they had not tendered delivery of the equipment.

The defendants were given unconditional leave to defend the action.

On appeal, the same arguments were canvassed before me. In respect of the second submission, I was of the view that there was an offer by the plaintiffs, at the latest, on 30 November 1985 to deliver the equipment which the defendants failed to take up. Further, and in any event, I was of the view that the defendants by their conduct refused delivery or to agree to a date of delivery which amounted to a repudiation of the supply contract. The question of the plaintiffs having to make a tender therefore did not arise: see *Levey & Co* v *Goldberg*[1] at p 692.

On the question of frustration, counsel for the defendants submitted that it raised a triable issue. He referred to the well-known case of *Krell* v *Henry*[2] where Vaughan Williams LJ (at p 749) stated the doctrine of frustration in these terms:

... I do not think that the principle of the civil law as introduced into English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general works, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited.

Counsel for the defendants contended that the supply contract needed 'for its foundation the existence of a particular state of things', in this case, the continuing existence of the Gateway Project, and that the cancellation of the Gateway Project had frustrated the supply contract and thereby relieved the defendants from further liability to take delivery of and pay for the equipment.

It was not disputed that the main contract had been effectively terminated either by Turner by their letter dated 18 January 1985 or by the employer by its letter dated 22 January 1985 as a riposte to Turner's notice of termination.

It was on the basis of these selective facts that the defence of frustration was argued before me. However, I was able to take judicial notice of Suit No 3599 of 1985 which had been commenced by the defendants on 23 April 1985 in which they had sued Turner for payment of certain sums alleged to have been due and payable under the subcontract. The facts disclosed and what had transpired in those proceedings threw a different light on the submission of counsel for the defendants.

The defendants' claim against Turner in Suit No 3599 of 1985 was for $23,150,331 for part of the subcontract works which the defendants contended were payable under cl 21 of the subcontract consequent upon the termination of the subcontract by Turner. Clause 21 provided as follows:

Determination of the main contract

If for any reason the contractor's employment under the main contract is determined (whether by the contractor or by the employer and whether due to any default of the contractor or otherwise), then the employment of the subcontractor under this subcontract shall thereupon also determine and the subcontractor shall be entitled to be paid:

(i) The value of subcontract works completed at the date of such determination, such value to be calculated according to cl 10 hereof.

(ii) The value of work begun and executed but not completed at the date of such determination, such value to be calculated according to cl 10 hereof.

(iii) The value of any unfixed materials and goods delivered upon the site for use in the subcontract works, the property in which has passed to the employer under the terms of the main contract.

(iv) The cost of materials or goods properly ordered for the subcontract works for which the subcontractor shall have paid or of which he is legally bound to accept delivery. On such payment by the contractor any materials or goods so paid for shall become the property of the contractor.

(v) Any reasonable cost of removal from the site of his temporary buildings, plant, machinery, appliances, goods and materials.

The claim for $23,150,331 was made up as follows:

(1) $1,822,724 being the amount included in certificate no 18 issued by the architects dated 14 December 1984;

(2) $2,696,457 being the amount included in certificate no 19 issued by the architects dated 15 January 1985;

(3) $2,007,012 due under their payment application no 20;

(4) $16,624,138 due as costs of materials or goods properly ordered for the subcontract works.

The item of claim relevant to the present action is item (4). In the application for summary judgment against Turner the defendants filed the affidavit of its commercial manager, one Gary Elmer Taylor, on 2 May 1985, para 17 of which reads as follows:

Annexed hereto and collectively marked 'GT 10' is a list of the various suppliers to whom sums are payable in respect of costs of materials and goods ordered for the said subcontract works, and of which the plaintiffs *are legally bound to accept delivery*. The total sum of $16,624,138 is due and payable by the defendants under cl 21(iv) of the subcontract. (emphasis added)

One of the schedules in 'GT 10' refers to order no 008 from 'MTU' (the plaintiffs herein) for $940,000, which order forms the basis of the plaintiffs' claim in this action.

Turner's general answer to the entire action was that none of the sums claimed by the defendants was payable on various grounds, the principal one being that the value of the subcontract works, which was subject to calculation according to cl 10 of the subcontract, had not been made. The specific answer to the claim for $16,624,138 for materials supplied or ordered (which included the equipment) was that, inter alia, it required investigation as the goods might not have been properly ordered or that the defendants were not legally bound to accept them from the suppliers.

Chua J gave judgment (now reported in [1987] 1 MLJ 443) for the defendants in the sum of $4,519,181

being the arrears certified under certificates nos 18 and 19 and stayed the balance of the claim for $16,949,572 (which included the claim for materials supplied or ordered) pursuant to s 7 of the Arbitration Act.

Taking into account the additional facts, I decided that frustration as a defence was not available to the defendants on the ground, firstly, that the defendants' reason for not accepting delivery of the equipment was that Turner had terminated the main contract and had stopped work (and not because the Gateway Project had ceased to exist) and that any default of Turner in respect of their obligations under the subcontract was a contingency which had been provided for in cl 21 thereof.

Secondly, I also found that in the circumstances of this case counsel's argument that the continued existence of the Gateway Project formed the basis of the supply contract had no factual or legal basis.

I will now elaborate on these grounds. The law and its rationale are aptly summarized in two passages in 9 *Halsbury's Laws of England*, 4th Ed, para 450 at p 314 which read as follows:

> The doctrine of frustration operates to excuse from further performance where (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place, and (2) before breach, an event in relation to the matter stipulated in (1) renders performance impossible or only possible in a very different way from that contemplated, but without default of either party.
>
> The doctrine of frustration has been variously stated to depend on an implied condition, the disappearance of the foundation of the contract, the intervention of the law to impose a just and reasonable solution, or the fact of a radical change in the character of the obligation; but the last view is now the predominant one. That view requires the interpretation of the terms of the contract in the light of the nature of the contract and the relevant surrounding circumstances, and an inquiry whether those terms are wide enough to meet the new situation.

What was the nature of the supply contract and the surrounding circumstances that, as contended by the defendants, made the existence of the Gateway Project the foundation of the supply contract? The nature of the supply contract was the manufacture and installation by the plaintiffs of three generating sets at the site of the Gateway Project. The circumstances were as follows: (1) the defendants had subcontracted to carry out and perform the subcontract works at the price of $45,620,000; (2) they agreed to purchase the equipment as part of the subcontract works at the price of $940,000 (which was slightly more than 2% of the value of the subcontract works); (3) the supply contract was not subject to the terms of the subcontract; (4) cl 21 of the subcontract provided for payment to the defendants not only for works done and goods delivered but also for goods for which they were legally bound to accept at the determination of the subcontract (whether by Turner or the employers or whether due to the default of Turner or otherwise).

In my view, the nature of the supply contract and the aforesaid circumstances could not justify a court in implying that the continued existence of the Gateway Project was fundamental to the performance of the supply contract by either party. In the first place, the supply contract was only a sub-subcontract for an insignificant portion of the Gateway Project. The existence of the Gateway Project did not have, in the words of Lord Radcliffe in *Davis Contractors Ltd* v *Fareham Urban District Council*[3] at p 731 'the same significance for each' party in that the value of the supply contract was slightly more than 2% of the value of the subcontract. Secondly, the plaintiffs had no contractual relationship either with the employers or Turner nor was the supply contract subject to the terms and conditions of the main contract or the subcontract. Thirdly, the plaintiffs' obligation under the supply contract was merely to supply and install the equipment to the Gateway site and the defendants' obligation was to accept delivery and pay for the equipment. Any prospective loss by the defendants in having to take delivery and pay for the equipment in the event of the cancellation of the Gateway Project was underwritten and secured by Turner's liability to pay under cl 21 of the subcontract. In these circumstances, neither the plaintiffs nor the defendants needed the continued existence of the Gateway Project as the foundation of the supply contract.

With reference to my second ground, I have found that there was 'no evidence that the Gateway Project has been cancelled by the owners' in relation to the facts. By this, I meant the abandonment or permanent cessation of the Gateway Project. Both Turner and the employers have purported to terminate the main contract and construction work on the development came to a standstill. In relation to the law, I should observe that the fact that both the employers and Turner purported to determine the main contract on the ground of each other's default must mean that one of them must have been at fault. As between themselves, the main contract was not frustrated but merely breached. The determination of the main contract led to the determination of the subcontract by its own terms. It follows that the subcontract could not have been frustrated and counsel for the defendants did not contend that it was frustrated. That being the case, there was no basis for arguing that the supply contract was frustrated. It would be extremely odd if the defendants, in reliance on the same event or contingency, could successfully maintain an action against Turner for pay-

ment of the equipment on the basis that the subcontract was not frustrated and at the same time successfully mount a defence against the plaintiffs' claim for payment of the same equipment on the basis that the supply contract was frustrated.

In the ultimate analysis, the submission of counsel for the defendants was based on a false characterization of the issue. The issue is not whether the existence of the Gateway Project was the foundation of the supply contract. The issue is whether the defendants' obligation under the supply contract had been rendered impossible or radically different from that which they have agreed to perform by the occurrence of an event which was not within the contemplation of the parties and not due to the fault of either party.

The suspension of the Gateway Project resulting from the determination of the main contract and with it the termination of the subcontract was the very contingency which the defendants had provided for in cl 2 of the subcontract. There was no triable issue on this point.

For these reasons, I was of the view that the circumstances of this case did not require the intervention of the court to impose a more just and reasonable solution than to give judgment for the plaintiffs, which I did.

Order accordingly.

Solicitors: *Chu Chan Gan & Ooi*; *Wee Swee Teow & Co.*

Reported by *Ng Sheau Jiuan*

BRUNEI REPORTS

Public Prosecutor v Sanli bin Sunggoh & Anor

HIGH COURT (BANDAR SERI BEGAWAN) – CRIMINAL TRIAL NO 3 OF 1988
ROBERTS CJ AND CAIRD J
9-11, 13-18, 20, 22-24 AND 29 AUGUST 1988

Criminal Law – Gang robbery – Murder in the course of committing gang robbery – Causing grievous hurt in the course of committing gang robbery – Provocation – Motive – Whether necessary to establish it – Co-defendants – Sentencing – Mitigation – Circumstances to be considered – Penal Code, ss 299, 300, 391, 395, 396 & 397

Evidence – Criminal trial – Co-defendants – Confession – Whether may be used against co-defendant – Evidence Act (Cap 108), s 30

The defendants each faced two charges. The first charge against both defendants was that they had committed gang robbery and that in the commission of it the murder of one Ong Hong King (who was the son of one Ong Cheng Ham also known as Jaham) was committed by one of them and that thereby they had committed an offence punishable under s 396 of the Penal Code. The second charge against both defendants was that they had committed gang robbery and that at the time of committing the said robbery they had caused grievous hurt to one Ong Cheng Ham and had thereby committed an offence under s 395 read with s 397 of the Penal Code and punishable under s 397 of the Code.

The evidence tendered included a separate confession made by each defendant to a magistrate. Both defendants also gave evidence in the witness box. The first defendant's defence generally was that he was desperate to settle his debts outstanding to the defendants' employer, one Zain, and therefore decided to rob Jaham. He discussed the matter with the second defendant and both he and the second defendant knew that they would be taking knives into the car in which they were to take a lift from Jaham and his son. The first defendant said that he produced a knife while he and the second defendant were in the car and held it to the ear of the son in order to frighten him and not to kill him. The first cutting of the son was therefore an accident and occurred when the son turned his head unexpectedly. Similarly, he alleged that the other wounds on the body of the son were all the result of a struggle in the car and caused accidentally.

The second defendant told a different story. According to him, he was surprised to see the first defendant attack the son and use a knife as he did not know that knives had been taken into the car. He denied that he caused any of the wounds to the father, though he admitted that he picked up a knife, because he thought the father, whom he saw to be bleeding profusely, might attack him. Each of the defendants asserted that what he said in evidence was true whenever this conflicted with something contained in a statement made by him to a magistrate, since he only made this either because the police had coached him or because he was afraid of them.

It was submitted for the first defendant that the higher penalty provided by s 397 of the Code may only be inflicted on an offender who actually uses a deadly weapon, or causes or attempts to cause death or grievous hurt.